

In the Matter of Melvin Robinson,
Docket No. 2003-4404
(Merit System Board, decided December 21, 2005)

The appeal of Melvin Robinson, a former Police Officer with the City of East Orange, concerning his release at the end of his working test period, effective May 28, 2003, was heard by Administrative Law Judge Edith Klinger (ALJ), who rendered her initial decision on November 14, 2005. No exceptions were filed by the parties.

Having considered the record and the ALJ's attached initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on December 21, 2005, did not adopt the recommendation of the ALJ to uphold the appellant's release at the end of his working test period. Rather, the Board ordered that the appellant be reinstated and be given a four-month extension of his working test period in accordance with *N.J.A.C. 4A:4-5.2(e)*.

DISCUSSION

The appellant was appointed as a Police Officer with the City of East Orange on January 7, 2002, and he completed the requisite training at the Essex County Police Academy on May 28, 2002. He commenced his one year working test period on May 28, 2002. *See N.J.S.A. 11A:4-15 and N.J.A.C. 4A:4-5.2(d)*. According to the performance evaluations in the record, the appellant's overall work performance was rated as "average" from June 30, 2002 through July 27, 2002, from August 18, 2002 through September 7, 2002, from September 22, 2002 through September 29, 2002, from October 6, 2002 through October 19, 2002, and from March 23, 2003 through April 12, 2003. His overall work performance was rated as "unsatisfactory" during the period of September 8, 2002 through September 14, 2002.¹ On May 27, 2003, the appellant was advised that he was being released at the end of his working test period, based on unsatisfactory work performance and excessive absenteeism. Specifically, the appointing authority asserted that the appellant was absent from work 107 of the 208 work days in his working test period. Upon the appellant's appeal of his release at the end of his working test period, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In her initial decision, the ALJ found it significant that the appellant was absent for 95 days during the last six months of the working test period.

¹ The performance evaluations for the balance of the appellant's working test period are not part of the record in the instant matter.

The appellant testified that these absences were occasioned by a series of unfortunate events, including the death of his father in September 2002, his mother's prolonged illness which ultimately resulted in her death in December 2002, his own personal health problems between December 2002 and March 2003, and an injury sustained in the line of duty in April 2003. Although not clearly articulated in the record, it appears that the appellant utilized a combination of approved sick, personal, administrative and family leave for his extensive absences. It is evident that the appellant also was on an approved leave of absence for his work-related injury for two weeks in April 2003. The ALJ noted that the credible testimony of the appellant's superior officers reflected that his work performance was in need of improvement after the first six months of his working test period, and his extensive absences during the last six months of his working test period rendered him unable to improve his performance and receive appropriate on-the-job training. In recommending that the appellant's release be upheld, the ALJ emphasized that the appellant had not submitted any medical documentation or other evidence to justify his excessive absenteeism. Thus, the ALJ determined that the appellant failed to meet his burden of proof that the release at the end of his working test period was in bad faith. Upon its *de novo* review of the record, the Board disagrees with the ALJ's determination and finds that the appellant should be reinstated to employment and provided a four-month extension of his working test period.

N.J.A.C. 4A:4-5.2(e) expressly provides that an approved leave of absence *shall* extend the completion of the working test period for a period of time equal to that leave. It is clear that the appellant's working test period was not extended in accordance with this regulation. The provision of an automatic extension of an employee's working test period in the event of an approved leave of absence ensures that the employee is afforded an adequate opportunity to demonstrate his ability to perform the job satisfactorily and to correct any deficiencies in job performance in a timely manner. The necessity of such an extension is especially evident in the instant matter. Here, the appellant's work performance was rated as "average" for the majority of the first six months of his working test period. While some deficiencies were noted in the performance evaluations in the record, the appellant did not have an adequate opportunity to address those deficiencies and improve his performance due to a series of personal and work-related health problems and deaths in his family that necessitated his absence from work. A large portion of the appellant's absences were approved leaves of absence due to his unfortunate circumstances, which should have automatically extended his working test period. Since the appellant's working test period was not so extended, the Board finds it appropriate to reinstate him to employment and afford him a four-month extension of his working test period. As noted previously, it is not clearly articulated in the record precisely how many days

the appellant was out of work on approved leaves of absence during his working test period. Nevertheless, the Board finds that four months is an appropriate time frame for the appellant to correct his prior deficiencies and demonstrate his ability to satisfactorily perform his job duties.

Additionally, the Board notes that the appellant is not entitled to back pay or counsel fees. In non-disciplinary appeals, such as an appeal of a release at the end of the working test period, the standard for determining whether an appellant is entitled to back pay is governed by *N.J.A.C. 4A:2-4.3(c)* and *N.J.A.C. 4A:2-1.5(b)*. *N.J.A.C. 4A:2-1.5(b)* provides, in pertinent part, that back pay and counsel fees for appeals that are not based on disciplinary action or the challenge of the good faith of a layoff “may be granted . . . where the Board finds sufficient cause based on the particular case.” In this case, the Board has not found that the appellant is entitled to a permanent appointment based on the successful completion of his working test period. Rather, he is simply entitled to a four-month extension of his working test period. Therefore, sufficient cause has not been demonstrated in this matter to award back pay and counsel fees. *See e.g., In the Matter of Rocky Rembert* (MSB, decided December 3, 2003). *Compare, In the Matter of Randy Geis* (MSB, decided November 20, 2002) (Board awarded permanent status, back pay, benefits and seniority where the appellant was not released for specific work-related deficiencies and the record established that he had otherwise satisfactorily completed his working test period) and *In the Matter of Tracy Bowers* (MSB, decided November 10, 1992) (The appellant was entitled to permanent status and back pay where the record established that the appellant had satisfactorily completed his working test period and the appointing authority nonetheless improperly released him from employment).

ORDER

The Merit System Board finds that the appointing authority’s action in releasing Melvin Robinson at the end of his working test period was not justified. Therefore, the Board reverses the release and upholds the appeal of the appellant. Further, the Board orders that the appellant be reinstated to the position of Police Officer and be afforded a four-month extension of his working test period. Moreover, the Board orders that back pay and counsel fees be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.